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# In the Supreme Court of the United States

October Term, 1980

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UNIVERSITIES RESEARCH ASSOCIATION, INC.,
*Petitioner,*

v.

STANLEY E. COUTU

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF AMICI CURIAE OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO

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LAURENCE J. COHEN
TERRY R. YELLIG
1125 15th Street, N.W.
Washington, D.C. 20007
*Counsel for Building Trades Dept.*

GEORGE KAUFMANN
2101 L Street N.W.
Washington, D.C. 20037
*Of Counsel.*

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
*Counsel for AFL-CIO.*

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This brief *amici curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations, a federation of 104 national and international labor organizations having a total membership of approximately 13,500,000 working men and women, and the Building and Construction Trades Department, a Department of the AFL-CIO, which is composed of 15 such unions having a total membership of 4,000,000, with the consent of the parties as provided for in Rule 42 of this Court.

## ARGUMENT

The Davis-Bacon Act, 40 U.S.C. § 276a et seq., and related legislation,[1] imposes two sets of obligations, both for the "benefit of construction workers" (*U.S.* v. *Binghamton Construction Co.*, 347 U.S. 171, 178). First, the Act requires the Government agency letting or financing certain contracts for "construction, alteration and/or repair, including painting and decorating" [2] to include in those contracts a provision for the payment of "minimum wages" to the "laborers and mechanics" employed to do that work "based on the wages * * * determined by the Secretary of Labor to be prevailing on [similar] projects [in the area]"; second, of course, the Act also requires the contractors to whom the work is let to pay those wages in the manner specified.

The instant case is a suit by workers against a contractor for back wages alleging a breach of the latter obligation. The ultimate merits issue raised by the complaint is whether the work the plaintiffs performed, and for which they were paid less than the applicable minimum wage, is "construction, alternation and/or repair" and therefore

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[1] For a compilation of the laws that extend Davis-Bacon's minimum wage provisions to various types of federally-supported construction see 29 C.F.R., Part 1, App. A. See also: 40 U.S.C. 276c (the Copeland-Anti-Kickback Act) (which provides the Secretary of Labor further authority in the administration and enforcement of the Davis-Bacon and related Acts); and Reorganization Plan No. 14 of 1950 (5 U.S.C. App. at 746) (which grants the Secretary of Labor authority to prescribe standards, regulations and procedures to be observed by contracting agencies).

[2] The meaning of this statutory phrase has been elaborated in the Secretary of Labor's regulations promulgated pursuant to the Act:

> The terms "construction," "prosecution," "completion,"

covered by the Davis-Bacon Act. The threshold issue is whether the Act creates such a right of action by workers against contractors.

The very fact that Davis-Bacon creates two sets of obligations suggests that a suit against the contractor is not the only possible means by which construction workers may vindicate their rights as declared in that Act. This controversy, after all, was precipitated by the *contracting agency's* determination that the work the plaintiffs performed is not Davis-Bacon work.[3] And, the two Courts of

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or "repair" mean all types of work done on a particular building or work at the site thereof or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project, including without limitation, altering, remodeling, painting and decorating, the transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor, and the manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work, or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project, by persons employed by the contractor or subcontractor. A mere token beginning of the work shall be deemed to be the "beginning of construction" as that term is used in the National Housing Act. [29 C.F.R. 5.2(g). See also Federal Procurement Regulations, 41 C.F.R. 1-18.701.]

[3] In a most recent expression on the subject, the Attorney General concluded that it "is well-established that the Secretary of Labor has the authority to interpret the substantive provisions of contract labor standards statutes, including the provisions concerning coverage. * * * The Secretary decides whether a particular class of contracts is covered by a [particular minimum wage] statute based upon the standards outlined in the statutes within the bounds of administration discretion." (43 Op. Att'y. Gen. No. 14, pp. 6, 20-21; March 9, 1979.) Nevertheless, as this case demonstrates, contracting agencies often make coverage determinations without consulting the Secretary. And, the government recognized

Appeals that have reached the question have concluded that such determinations are subject to judicial review. (*North Georgia Bldg. & Const. Trades* v. *Goldschmidt,* ..... F.2d ..... (C.A. 5, No. 77-1581, July 15, 1980); *Com. of Va., Ex. Rel. Com'r., Etc.* v. *Marshall,* 599 F.2d 588 (C.A. 4); cf., *Fry Bros. Corp.* v. *Department of Housing, Etc.,* 614 F.2d 732 (C.A. 10); see also *International U. of Operating Eng., Local 627* v. *Arthurs,* 480 F.2d 603 (C.A. 10) affirming 355 F.Supp. 7 (W.D. Okla.).) Whether or not the Seventh Circuit's decision concerning the availability of direct actions against contractors is affirmed, we submit that the Fourth and Fifth Circuit rulings on the reviewability of final agency action under the Davis-Bacon Act are plainly correct. For, as we now show, the law governing the implication from federal statutes of rights of action against private parties is entirely distinct from the law governing judicial review of agency action, and the basic principles developed in the latter area lead inevitably to the conclusion that contracting agency Davis-Bacon coverage decisions are reviewable in court.[4]

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in its brief *amicus curiae* in support of the petition for *certiorari* in this case (at p. 20, n. 17) "neither the Davis-Bacon Act nor the regulations promulgated thereunder now provide an administrative remedy in favor of an employee who has been injured by the failure to include prevailing wage provisions in a contract."

[4] In recognition of the distinction set out in the text, the Government, which seeks reversal of the decision below, notes "this case does not present the question whether an employee would have a cause of action against the Government (either at the time of contract bid solicitations or thereafter) to challenge a final agency decision not to include Davis-Bacon Act specifications in a contract. We express no views on this question." (U.S. Br. 17, n. 14.) We agree with this statement of the limits of the present action; we believe, however, that it will be helpful to the Court in analyzing the question presented to be more full-informed on the related

**1(a)** Congress has never addressed in universal terms the question of when federal statutes which are not explicit on the point create rights of action against private parties. Thus, as the Court stated in *Transamerica Mortgage Advisors* v. *Lewis*, 444 U.S. 11, the most recent relevant decision:

> The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction. *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568; *Cannon* v. *University of Chicago*, *supra* [441 U.S. 677], at 688; see *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (*Amtrak*). While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, *e.g.*, *J. I. Case Co.* v. *Borak*, *supra*, [377 U.S. 426], what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear. *Touche Ross & Co.* v. *Redington*, *supra*, at 568; *Cannon* v. *University of Chicago*, *supra*, at 688 [444 U.S. at 15-16.]

And, as the ensuing discussion (*id.* at 16-24) shows, the "dispositive question" to be decided through investigation of the particular statute's language, structure and legislative history, is "whether Congress intended to create any such remedy" (*id.* at 24).

**(b)** The legal setting when the question is whether Congress has empowered the courts to entertain a suit seeking review of a final agency action is quite different. The Court in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, established:

> [A] survey of such cases shows that judicial review

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question noted, but not developed, by the Government. That is the purpose of the balance of our brief. Because the correctness of the Court of Appeals' decision herein is discussed at length by the

of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. * * * Early cases in which this type of judicial review was entertained, have been reinforced by the enactment of the Administrative Procedure Act which embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of relevant statute," 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701 (a). The Administrative Procedure Act provides specifically not only for review of "[a]gency action made reviewable by statute" but also for review of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions,[2] and this Court has echoed that theme by noting that the Administrative Procedure Act's "generous review provisions" must be given a "hospitable" interpretation. *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51 * * *. Again in *Rusk* v. *Cort, supra,* [369 U.S. 367] at 379-380, the Court held that only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.

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[2] See H.R. Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946): "To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." See also S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1946). [*Id.* at 140-141; citations ommitted.]

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parties and by the Government, and because we have nothing of substance to add to respondent Coutu's arguments supporting his cause of action, we do not revisit that subject except to explore a matter central to all aspects of the overall problem raised by this case—the Davis-Bacon Act's legislative history.

Moreover, as *Barlow* v. *Collins*, 397 U.S. 159, emphasized:

> Since the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the Secretary, but by judicial application of canons of statutory construction. See *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 268-270. ["The role of the courts should, in particular, be viewed hospitably where . . . the question sought to be reviewed does not significantly engage the agency's expertise. [W]here the only or principal dispute relates to the meaning of the statutory term' . . . [the controversy] presents issues on which courts, and not [administrators], are relatively more expert."] *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 14 (HARLAN, J., dissenting). [397 U.S. at 166.]

Additionally, in *Barlow's* companion case, *Data Processing Service* v. *Camp*, 397 U.S. 150, the Court disapproved those earlier cases that had required parties challenging agency action to demonstrate, in order to show their standing to sue, that "the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege" (*id.* at 153 quoting *Tennessee Power Co.* v. *TVA*, 306 U.S. 118, 137-138).[5] For:

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[5] In *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, the Court held that companies challenging a minimum wage determination under the Public Contracts Act (49 Stat. 2306 (1936)) lacked "standing to sue" (*id.* at 132), stating in support of that holding:

> We are of opinion that no legal rights of respondents were shown to have been invaded or threatened in the complaint upon which the injunction of the Court of Appeals was based. It is by now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such. Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration

> The "legal interest test" goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test * * * [—] whether the dispute sought to be adjudicated will be presented in an adversary content and in a form historically viewed as capable of judicial resolution [—] * * * the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Thus the Administrative Procedure Act grants standing to a person "aggrieved by agency action within the meaning of a relevant statute". 5 U.S.C. § 702 (1964 ed. Supp. IV). [397 U.S. at 151-52, 153.]

The Courts of Appeals have uniformly concluded that it follows inescapably from the principles stated in *Abbott Laboratories, Barlow* and *Data Processing* that the judiciary has the authority to determine suits seeking review of final agency action by contracting agencies brought by those alleging that the agency action has caused them "economic * * * injury in fact" (*Data Processing,* 397 U.S. at 152), except in the particular instances in which the Government shows " 'clear and convincing evidence' of a contrary legislative intent" (*Abbott Laboratories,* 387 U.S. at 141). (See, e.g., *Scanwell Laboratories, Inc.* v. *Shaffer,* 424 F.2d 859, 865 (C.A. D.C.); *Merriam* v. *Kunzig,* 476 F.2d 1233, 1240 (C.A. 3), *cert. denied,* 414 U.S. 199; *William F. Wilkie, Inc.* v. *Department of the Army of U.S.,* 485 F.2d 180, 192 (C.A. 4); *Hayes Int'l. Corp.* v. *McLucas,* 509 F.2d 247, 258 (C.A. 5).) [6]

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of the law. [*id.* at 125; footnotes omitted]

The leading authority cited to support this reasoning was *Tennessee Power Co.* (See 310 U.S. at 125, n. 10.) Thus, there can be no doubt that the "standing" holding of *Lukens Steel,* like that of *Tennessee Power* itself, is no longer authoritative.

[6] To be sure, as the Government argues (U.S. Br. 31-32), any right to challenge the correctness of an agency determination im-

We therefore turn directly to the question of whether there is such evidence.

**2(a)** The Davis-Bacon Act does not expressly provide for judicial review, nor does it even address that subject in terms. But, as the sponsors of Administrative Procedure Act stated that is "certainly no evidence of intent to withhold review". (S. Rep. No. 752, 79th Cong., 1st Sess., 26, quoted in *Abbott Laboratories,* 387 U.S. at 140, n.2.) The structure and purpose of Davis-Bacon, moreover, support the proposition that the courts have the authority to decide review cases brought by employees adversely affected by contracting agency decision as to whether particular work comes within the statutory term defining the scope of the Davis-Bacon Act—"construction, alteration and/or repair." "The role of the courts should, in particular, be viewed hospitably where . . . the question sought to be reviewed does not significantly engage the agency's expertise '[W]here the only or principle dispute relates to the meaning of the statutory term' . . . [the controversy] presents issues on which courts, and not [administrators], are relatively more expert." (*Barlow,* 397 U.S. at 166.) Additionally, "[o]n its face, the [Davis-Bacon] act is a minimum wage law designed for the benefit of construction workers". (*Binghamton Construction Co.,* 347 U.S. at 178.) And,

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poses some costs in terms of possible delay and uncertainty. But that argument provides no basis for concluding that those costs are higher in the procurement context than in the other instances to which the APA reviewability presumption applies, or that Congress was wrong in concluding that such costs are outweighed by the costs of failing to assure that agency action comports with the law. *Abbott Laboratories* itself concerned the right to review agency action designed to implement the vital interests in public health and safety protected by the Federal Food, Drug and Cosmetics Act.

> The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realized. [*Barlow*, 397 U.S. at 167.]

**(b)** The Davis-Bacon Act became law in 1931 (46 Stat. 1494), and its substantive provisions have been amended twice (49 Stat. 1011 (1935) and 78 Stat. 238 (1964).[7] For present purposes, the 1931 and 1935 legislative history can be dealt with summarily:

The only extended discussion in the 1931 Committee Reports and floor debates[8] remotely bearing on the issue of judicial review is Rep. Bacon's comment:

> In 90% of the cases [the Secretary of Labor] feels there will be no dispute of any kind. Where there is a dispute which cannot be ironed out on the spot by the contracting officer of the government, the matter will be referred to the Secretary of Labor for final decision. The Department of Labor has a well-organized conciliation service; the administration feels the officer of this service, when called on, will be able, without trouble, to settle disputes amicably, expeditiously and to the satisfaction of everyone. [74 Cong. Rec. 6511; see also *id.* at 3919 (Sen. LaFollette), *id.* at 6515 (Rep. Kopp) & *id.* at 6520 (Rep. Zihlman), all to the same effect.]

The anticipation that the Secretary's delegates, or where necessary the Secretary himself, will be able to settle disputes generated by the Act and its administration to the satisfaction of the affected parties obviously is not the equivalent of an intent to preclude judicial review of final

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[7] The only other Davis-Bacon amendments, 54 Stat. 399 (1940) and 74 Stat. 418 (1960), expanded the Act to cover the territories of Alaska and Hawaii and then, when those territories became States, made the necessary technical change.

[8] H.R. Rep. No. 2453, 71st Cong., 2d Sess.; S. Rep. No. 1445, 71st Cong., 2d Sess.; 74 Cong. Rec. 6504-21 (House), 3818-19 (Senate).

agency action in those instances in which that anticipation is not realized.

In reviewing the legislative history of the 1935 amendments,[9] which provide for predetermination of minimum wages and create certain remedies against contractors who violate the Act's provisions, and which were passed without amendment or debate, we have not found a word on the question of the judiciary's authority to redress erroneous agency action. This question did, however, receive consideration during the debate over the 1964 amendments.

In 1963 the House Education and Labor Committee reported out a bill (H.R. 6041) to include fringe benefits in the computation of Davis-Bacon minimum wages. The Committee Report deals solely with that subject. (See H.R. Rep. No. 803, 88th Cong., 1st Sess.) In supplemental views, Representatives Frelinghuysen, Ayres, Quie, Goodell and Bell argued that the Committee bill should be expanded to include, *inter alia,* a provision expressly providing for judicial review. (*Id.* at 29.)

When, during the next year, the full House of Representatives considered H.R. 6041, the parliamentarian ruled that amendments to that bill going beyond the subject of fringe benefits would not be germane and thus would not be in order under the House rules. (See 110 Cong. Rec. 1195-1196.) An effort was therefore made to waive the House rules in order to permit consideration of non-germane amendments to H.R. 6041, including a proposal by Rep. Goodell providing for judicial review of prevailing wage determinations by the Secretary of Labor. Four of the Congressmen who spoke in favor of following ordinary

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[9] H.R. Rep. No. 756, 74th Cong., 1st Sess.; S. Rep. No. 1155, 74th Cong. 1st Sess.; 79 Cong. Rec. 14384 (House), 12072-4 (Senate).

procedure—Reps. James Roosevelt, Pucinski, Fogarty and Sisk—addressed the Goodell amendment. Rep. Roosevelt set the tone by stating:

> Mr. Speaker, may I first point out that the debate up to this point has been largely about a matter which is not in this bill under consideration here today. The debate up to this point has been on the merits of a proposition which perhaps has some merit. * * *
>
> What are they asking? What is all the fuss about, then? They are asking that we now open up this bill so that sitting here in the Committee of the Whole we may do the job of the Committee on Education and Labor instead of letting the committee do it in the orderly processes, which I am sure everybody in this House fully understands. [110 Cong. Rec. at 1198; see also to the same effect *id.* at 1202 (Rep. Sisk).] [10]

And Rep. Fogarty added:

> And what will the court do [under the Goodell amendment]? It will consider, from the very beginning, what wage determination is appropriate for this project, an area in which they would have no competence at all. The court will disregard entirely what the Secretary did; reexamine all the evidence upon which the Secretary made his determination; and it may disregard any established practice, policy, or rule on which the Secretary acted. [110 Cong. Rec. 1201.]

The effort to waive the rules and to consider non-germane

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[10] Rep. Pucinski made the same point in a slightly different fashion:

> I cannot think of anything which could be more catastrophic to the cause of labor-management relations in the building industry than for the House to vote down the previous question at this time and to open this bill to massive revision at this time here on the floor of the House, when both the gentleman from Michigan and the gentleman from New York know that we are now in the process of holding hearings on the administration of this bill in the committee.
>
> I happen to agree with my colleague from Michigan that the

amendments was then defeated 297 to 105.[11]

Thereafter Rep. Goodell moved adoption of an amendment, ruled germane by the parliamentarian, providing for judicial review solely of the Secretary's fringe benefit determinations. (110 Cong. Rec. 1226-1227.) Reps. Roosevelt and Gill spoke against the Goodell amendment. Rep. Roosevelt began: "Mr. Chairman, may I suggest to my colleagues that the colloquy we have just heard is evidence [that you] are being asked to do by indirection what could not be done directly by the previous vote in the House," and added, "I would respectfully ask the Members of the Committee [of the whole House] to allow the [Labor] committee to do its job and let us pass this bill on its merits and not get it mixed up with other matters that should be more fully debated." (110 Cong. Rec. 1228.) Rep. Gill added:

> I merely point out that in the language of H.R. 9590, Department of Labor has gone way off the reservation in seeking precedents to establish prevailing wage scales.
>
> But I do not agree with my colleagues from New York and from Michigan that a judicial review procedure would give us the relief we are seeking. Judicial review cannot go beyond what is in this law. Until we have perfected the law to more precisely define the areas within which the Department of Labor can operate; how far could the Department of Labor go in seeking precedents for prevailing wages; until we spell out the intent of Congress in the very complicated area, the courts cannot go beyond what the Congress has provided or failed to provide in determining prevailing wage standards. For the Congress now to vote down the previous question and permit consideration and possible adoption of judicial review under the present law would create a degree of confusion in our district courts unprecedented in the courts' history. [110 Cong. Rec. 1200.]

[11] During the ensuing general debate on the Committee bill, Rep. Dent made an extensive statement arguing both that Rep. Goodell's proposal was unsound and that as a general matter judicial review of wage determinations is unwise. (110 Cong. Rec. 1210-1216.) So far as we have found, only Rep. Dent of H.R. 6041's supporters squarely took the latter position.

> which is the substance of the amendment which has been offered, the court, once its jurisdiction is asked for, would give no presumption of validity to any determination by reason of any prior administrative act of the Secretary of Labor; in other words, it would all start over from scratch, which would mean it would not be a short hearing. That would mean that all data would be presented. It would mean that perhaps several months of proceedings in the trial court would be required before there could be a ruling * * * [110 Con. Rec. 1229.]

Rep. Goodell's amendment was rejected (110 Cong. Rec. 1229).[12]

In the Senate, which accepted the House bill without amendment or floor debate (110 Cong. Rec. 14768-70), the only discussion of judicial review is contained in the Senate Labor Committee Report which concludes: "It has also been suggested to this committee as it was to the House of Representatives that the bill be amended to provide for judicial review of all predeterminations of wage rates. The committee shares the view of the overwhelming majority of the House Members that this suggestion should not be accepted." (S. Rep. No. 963, 88th Cong., 2d Sess., 4 (1964).)

Neither the House's determination not to waive its rules to consider a non-germane judicial review amendment, that body's rejection of alternative versions of that amendment which were viewed as transparent efforts to evade its determination to confine consideration of H.R. 6041 to the fringe benefit issue, a Senate Report finding a particular proposal for judicial review of wage determinations want-

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[12] Rep. Hall then moved an even narrower amendment providing for judicial review of fringe benefit determinations relating to construction for educational institutions. (110 Cong. Rec. 1230.) This amendment was also defeated after an inconclusive discussion of whether review in the Court of Claims was already available.

ing, or these three elements in conjunction, can overcome the presumption created by enactment of the Administrative Procedure Act that final agency action defining the scope of federal laws is subject to judicial review.

Indeed, even if the 1964 legislative history could be viewed as an outright rejection of the Goodell proposal, that rejection would not support the conclusion that Congress thereby intended to insulate *all* agency action pursuant to Davis-Bacon from judicial review. Ten years earlier this Court had held:

> Congress sought to * * * protect [contractors'] employees from substandard earnings by fixing a floor under wages on Government projects * * * by directing the Secretary of Labor to determine, on the basis of prevailing rates in the locality, the appropriate minimum wages for each project. The correctness of the Secretary's determination is not open to attack on judicial review. [*Binghamton Construction Co.*, 347 U.S. at 177; footnote omitted.]

The principle that squares that conclusion with the APA presumption of reviewability was lucidly explained by Mr. Justice Douglas in *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309. There Grace Lines alleged that the Canal Company, in setting tolls had not conformed to the formula set out in § 412(b) of the Canal Zone Code (a view shared by the Comptroller General). (See *id.* at 310-316.) The Court refused the relief sought:

> Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009, excludes from the categories of cases subject to judicial review "agency action" that is "by law committed to agency discretion." * * * The present conflict rages over questions that at heart involve problems of statutory construction and cost accounting: whether an operating deficit in the auxiliary or supporting activities is a legitimate cost in maintaining and operating the Canal for purpose of the toll

> formula. These are matters on which experts may disagree; they involve nice issues of judgment and choice, * * * which require the exercise of informed discretion. * * * The petitioner, as agent of the President, is given questions of judgment requiring close analysis and nice choices. * * * [*Id.* at 317.]

Basing his analysis on *Panama Canal Co.*, Judge Adams has incisively observed:

> [The] courts have been especially inclined to regard as unreviewable those aspects of agency decisions that involve a considerable degree of expertise or experience, or that are based upon economic projections and cost analyses, at least when the agency has broad leeway to devise the formula to be applied in any particular situation and when there are no discernible guidelines against which the agency decision may be measured. [*Local 2855, AFGE (AFL-CIO)* v. *United States*, 602 F.2d 574, 579 (C.A. 3).]

That statement captures with exactness the nature of the task Congress has delegated to the Secretary of Labor in directing him to determine the wages that are "prevailing for the corresponding classes of laborers and mechanics employed on [similar] projects [in the area]," and explicates the result reached in *Binghamton Construction Co.*

In essence then, Rep. Goodell's proposal sought to reverse *Binghamton Construction Co.* and thereby to extend judicial review beyond its normal confines. Rejection of that proposal could not justify denying review where it is ordinarily available and most urgently needed—"where the only or principle dispute relates to the meaning of a statutory term" and where the suit is brought by "a member * * * of the class [Congress] intend[ed] to protect" who alleges that unless review is provided "the statutory objectives might not be realized" (*Barlow*, 397 U.S. at 166-167).

This point is made more binding when the objections to the Goodell amendment voiced by Reps. Fogarty and Gill are taken into account. Both stressed that the amendment would empower the courts to make their own wage determinations *de novo,* thereby displacing the Secretary to whose expert judgment Congress had delegated the task of making wage determinations. (See pp. 12, 13-14, *supra.*) Such a grant of authority to the courts would, of course, run counter to the wise allocation of authority embodied, for example, in the primary jurisdiction doctrine. (Compare, *Far East Conf. v. United States,* 342 U.S. 570, 574-575.)

In *North Georgia Building & Const. Trades,* the Fifth Circuit concluded:

> The district court's review focused on the Board's conclusion that the Davis-Bacon Act was not effective before an application for federal assistance was received by the contracting agency. The Administrative Procedure Act permits judicial review unless "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."
>
> Under the Act, a statute is deemed to restrict access to judicial review "only upon a showing of 'clear and convincing evidence' of . . . legislative intent." The Davis-Bacon Act does not expressly preclude judicial review. Those portions of the legislative history which suggest a preclusion of review are addressed to review of wage determinations, not of agency decisions as to the coverage of the Davis-Bacon Act. We conclude that judicial review of the Wage Appeals Board's decision as to the applicability of the Davis-Bacon Act is not precluded by that Act. [Sl. Op. pp. 7380-7381; footnotes omitted.]

That conclusion accords with this Court's reminder "An agency may not finally decide the limits of its statutory power. That is a judicial function" (*Social Security Board*

v. *Nierotko*, 327 U.S. 358, 369), and properly applies the rule stated in *Abbott Laboratories* to the Davis-Bacon Act.[13]

## CONCLUSION

For the reasons stated by the respondent the judgment below should be affirmed; alternatively, if that judgment is reversed, that should for the reasons stated above, be accomplished in a manner that leaves the right to secure judicial review of final agency action as to the coverage of the Davis-Bacon Act unimpared.

Respectfully submitted,

LAURENCE J. COHEN
TERRY R. YELLIG
1125 15th Street, N.W.
Washington, D.C. 20007
*Counsel for Building Trades Dept.*

GEORGE KAUFMANN
2101 L Street N.W.
Washington, D.C. 20037
*Of Counsel.*

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
*Counsel for AFL-CIO.*

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[13] Ordinarily Davis-Bacon review cases will not present difficult question of remedy since if successful they will result in a directive to the Secretary of Labor to make the requisite wage determination. We note, however, that where the work has been done for less than the applicable wage by reason of agency error, the Act repells any suggestion that the workers should bear the loss and the question of whether the Government or the contractor should ultimately shoulder that expense is not a clear one. The contractor must pay it is settled where the increase stems from "an exercise of the sovereign power of the United States." (*The Metrig Corporation* v. *U.S.*) 427 F.2d 778 (ct. cl.).) On the other hand, if the Government is deemed to have acted in its "contractual capacity" in providing for increased wage payments, it appears that the added cost falls on the Government. (See *Morrison-Hardeman-Perini-Leavell* v. *U.S.*, 392 F.2d 988 (ct. cl.).)